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JUN 3 1982
ALEXANDER L. STEVAS,
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No. 81-1940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARTHUR YOUNG & COMPANY,

Petitioner,

—v.—

ROGER L. SUMMER,

Respondent.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTRODUCTORY STATEMENT

In its Petition for Certiorari, Arthur Young & Company ("AY")[1] advanced three reasons why this Court should review the decision of the United States Court of Appeals for the Eleventh (nee Fifth) Circuit.[2] For the most part, respondent Summer ignores these arguments and, instead, advances as his reason for this Court not reviewing the decision, the common refrain that all cases should be tried on the merits rather than dismissed on "technical grounds" such as the statute of limitations. This Court has repeatedly rejected this argument especially in an opinion of this Court referred to by Summer.[3]

In the one instance in which Summer addresses the merits of an argument raised in AY's Petition, his response not only demonstrates the fallacy of his and the Circuit Court's position, but it emphasizes the existence of a substantial conflict among the circuits.

Finally, AY has now had the opportunity to study the certiorari petition in *Herman & MacLean* v. *Huddleston*, Dkt. No. 81-680, *cert. granted*, 50 U.S.L.W. 3802 (April 5, 1982), which it was unable to obtain prior to filing its Petition. A review of that petition more clearly demonstrates both the identity and congruity of certain of the issues in that case and this case; and that by granting certiorari and consolidating this action with *Herman & MacLean*, the fullest exploration is possible of the important policy questions presented by these actions.

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1. All abbreviations and other references used are consistent with those used in the Petition, which is referred to as "Pet." Summer's Opposition Brief is referred to as "Opp. Br."

2. The co-defendants in this action, Raymond, James Associates, Inc. and the L&L group, have filed separate certiorari petitions from the decision of the Court of Appeals. Nos. 81-2001 and 81-2060, respectively. Each has since filed a joinder in this certiorari petition.

3. In Opp. Br. at 5, Summer refers to the decision of this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), as having somehow been limited by the Tenth Circuit. Summer's attempt to limit *Tomanio* is understandable because there this Court again made it clear that "[s]tatutes of limitations are not simply technicalities. On the contrary, they have been respected as fundamental to a well-ordered judicial system." *Id.* 446 U.S. at 487; *see also* Pet. at 6-7.

I.

A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS ON THE SCOPE AND APPLICATION OF THE FEDERAL EQUITABLE TOLLING RULE

Summer argues that the Fifth Circuit properly determined that whether plaintiff acted with due diligence to avail himself of the federal equitable tolling rule is a fact question reserved solely to the jury. This argument, as well as the Fifth Circuit's opinion, misconstrues the nature of the jury's role as it relates to application of the federal equitable tolling rule.

Where what plaintiff did or did not do (or knew or did not know) is in dispute, the jury's fact finding role remains inviolate as to *those* disputed facts. But once those facts are not in dispute, whether equitable tolling is available is no longer a jury issue but one of law for the Court to be determined by the application of an objective standard of conduct.[4]

This statement of the law (and the concomitant conflict among the circuits) is clearly demonstrated by two very recent circuit court opinions[5]—*Kramas* v. *Security Oil & Gas, Inc.*, 672 F.2d 766 (9th Cir. March 26, 1982); *Campbell* v. *Upjohn Co.*, ___ F.2d ___, [Current Binder] (CCH) FED. SEC. L. REP. ¶ 98,655 (6th Cir. April 29, 1982). In determining the applicability of the federal equitable tolling rule, both circuits, contrary to what the Court of Appeals did here, applied an objective standard in measuring due diligence and treated it as a question of law for the court.

Thus in *Kramas*, which, as here, involved a claim of fraud in connection with an offering prospectus and registration statement filed pursuant to the federal securities laws, the Ninth Circuit affirmed summary judgment for the defendant because the facts

4. Here, the facts as to Summer's conduct and the attendant circumstances were, for purposes of this motion and the judgment, based solely on the allegations in Summer's pleading and deemed true. As such there can be no factual issue for the jury and the question is solely one of law for the court.

5. One was decided subsequent to the filing of the petition and the other was decided just before the petition was filed, but publicly reported almost simultaneous with the filing of this petition.

demonstrated that plaintiff failed to exercise the due diligence required of him and that he knew or should have become aware of the alleged fraud. 672 F.2d at 770-71. The Ninth Circuit observed that although issues of due diligence sometimes present questions of fact, a plaintiff's "reasonable diligence is tested by an *objective* standard, *Fox* v. *Kane-Miller Corp.*, 542 F.2d 915, 917 (4th Cir. 1976). . . ." *Id.* at 770. (Emphasis added.).

It was of no avail for the *Kramas* plaintiff merely to assert that the statute was tolled because he had continued confidence in the defendant. Whether the plaintiff *subjectively* continued to repose such confidence is irrelevant; rather the pertinent inquiry is whether, viewed *objectively*, "in the exercise of reasonable diligence [the plaintiff] should have been aware of defendants' allegedly fraudulent conduct." *Id* at 771. (Citation omitted.)[6]

The Sixth Circuit's opinion in *Campbell* v. *Upjohn Co.*, *supra*, is even more closely analogous to the case at Bar—again highlighting the conflict between the circuits. In *Campbell*, summary judgment was affirmed in favor of the defendant in a §10(b) case despite the plaintiff's allegations that the fraud was concealed by representations of the defendants that a final payment *was forthcoming (but which was never received)*. The Sixth Circuit initially noted that it was "questionable whether these acts constitute concealment at all, since they did not conceal from the plaintiff the means of discovering his cause of action." *Id.* at p. 93,274. Yet even assuming that such statements could be construed as acts of fraudulent concealment, the Sixth Circuit rejected the argument that such allegations exempted the plain-

6. Among the facts relied on by the Ninth Circuit in applying the objective test was that the plaintiff received conflicting stories from the management of the issuer and that he had been refused access to the company's books. *Id.* at 770-71. Similarly here, Summer's complaint alleges that L&L and its management denied him access to L&L's books and records and that they repeatedly assured him that annual reports and financial information were forthcoming (but which were never received). Pet. at 4.

tiff from exercising due diligence. *Id.* A plaintiff who sought avoidance of:

> "the important public policies behind statutes of limitations . . . 'vital to the welfare of society'. . . owe[d] the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit."

Id. at p. 93,275.

Thus, notwithstanding the plaintiff's allegation that the statute was tolled because the defendant's statements about the forthcoming future payment lulled him into repose, other facts "as a matter of law . . . should have apprised a diligent plaintiff of his cause of action within the limitations period and . . . his inaction in the face of these facts does not warrant tolling the statute of limitations." *Id.* at p. 93,274. As a matter of law, the requisite diligence was nonexistent. *Id.* at p. 93,275.

Identically here, notwithstanding Summer's allegations that certain other defendants repeatedly represented that financial information was forthcoming (which he never received), Pet. at 4, all the other facts, such as denial of access to L&L's books and records and the failure to hold annual shareholders' meetings, demonstrate as a matter of law Summer's lack of due diligence. Indeed, the unfulfilled *repeated* promises that information about L&L was forthcoming would have caused any reasonable person to press his investigation forward with appropriate due diligence once the information was not received. Rather than lull Summer, it should have spurred him to action much sooner. The Fifth Circuit's conclusion to the contrary was reached by erroneously applying a subjective standard and deferring it as a question for the jury, although the facts as to what occurred or did not occur were never in dispute under Summer's own allegations.

As such, it conflicts with the objective standard of due diligence applied by the other circuits.[7]

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7. For the first time in this litigation, Summer suggests that his fraudulent concealment/due diligence allegations are impacted, in some unexplained fashion, by an undefined "fiduciary relationship"

(footnote cont'd. on next page)

II.

AY'S PETITION SHOULD BE GRANTED AND THIS CASE CONSOLIDATED WITH HERMAN & MACLEAN V. HUDDLESTON

AY previously noted the potential impact here of the grant of certiorari in *Herman & MacLean, supra*, Pet. at 16 n.17. However, prior to filing this Petition, AY was unable to obtain and review the petition in *Herman & MacLean*. A review of the *Herman & MacLean* petition indicates that the instant case not only presents the identical issue—whether conduct alleged to be a violation of the '33 Act for which an express remedy is provided may serve as a basis for an implied action under § 10(b) of the '34 Act—but along with *Herman & MacLean*, permits the fullest factual predicate for consideration of that issue and its ramifications.

Although alleging fraud in a public offering, the plaintiff in *Herman & MacLean* did not assert a claim under § 11 of the '33 Act and relied solely on implied claims based upon § 17(a) of the '33 Act and § 10(b) of the '34 Act. *Herman & MacLean* v. *Huddleston*, Dkt. 81-680, Petition for Certiorari dated October 8, 1981, at 3, 9 n.7. This case presents the corollary situation of a plaintiff, who alleging a fraud in a public offering of securities, simultaneously invoked express and implied claims under the '33 and '34 Acts, but whose express claims on those same facts under

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(cont'd.)
owed by "the defendants." Opp. Br. at 6. Whatever this reference is meant to imply as to the other defendants, it is well established that an accountant is not a fiduciary simply because he is engaged to perform, and does perform, the function of an independent auditor. *Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1972); *Competitive Associates, Inc.* v. *Laventhol Krekstein Horwarth & Horwath*, 478 F. Supp. 1328 (S.D.N.Y. 1979); *Shofstall* v. *Allied Van Lines, Inc.*, 455 F. Supp. 351, 360 (N.D. Ill. 1978). Thus, while an independent auditor might be liable to his client for acting negligently or fraudulently, *Franklin Supply Co.* v. *Tolman, supra*, 454 F.2d at 1065, in ordinary professional engagements, an auditor simply is not a fiduciary to his client, let alone a third party such as a shareholder. GORMLEY, THE LAW OF ACCOUNTANTS AND AUDITORS (1981) ¶5.01[1] at p. 5-2 n.2; CAUSEY, DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS (1979) at 72-73. Moreover, no court has ever found an independent auditor to be a fiduciary to a share holder under the facts presented here.

§§ 11 and 12(2) of the '33 Act were dismissed as time barred under § 13 of the '33 Act. Pet. at 4a-5a. The Court of Appeals nonetheless allowed the implied claims under § 17(a) of the '33 Act and § 10(b) of the '34 Act to escape the effects of the limitations provision provided by Congress in § 13. *Id.* at 5a-10a.

Finally, as noted in AY's Petition Pet. 16 n.17, even if this Court finds that a party may assert a claim for an implied remedy where an express remedy has been provided, the issue still remains whether the limitations period enacted by Congress to govern the express remedies with their congressionally mandated (and limited) tolling rule shall control over a more amorphous court created equitable rule based on a reference to state law. Pet. 14-17[8]

Thus, between this case and *Herman & MacLean v. Huddleston*, this Court has the opportunity to address the propriety of the avenues open to a plaintiff alleging fraud in connection with a public offering of securities (1) to disregard the express statutory

8. On April 30, 1982, the Eleventh Circuit decided *Gunter* v. *Hutcheson*, 674 F.2d 862 (11th Cir. 1982). That decision squarely conflicts with the decision of the panel in the case at Bar which failed to apply the congressionally created tolling rule in § 13 of the '33 Act to all of Summer's claims. In *Gunter*, the Eleventh Circuit held that the 1933 and 1934 Acts are construed "in pari materia as a single comprehensive regulatory scheme." *Id.* at 876. The Court went on to note:

> "Although . . . the 1933 and 1934 Acts do not overlap completely, and certain rights may be available under one Act which are not available under the other, . . . in this case the Gunters' claims under the 1933 and 1934 Acts are all based on the same fraud-misrepresentation theory. Consequently we conclude that permitting an action to go forward under the 1933 Act, which does not specifically provide for a private right of action, while holding that identical claims under the 1934 Act are barred by the defense of § 29(c), would create a dichotomy between the two Acts that was not intended by Congress and that would be counter to the express protection of innocent purchasers in § 29(c). Hence we hold that assuming the Gunters may bring an action under § 17(a) of the 1933 Act, . . . that action in this case is barred by the defense in § 29(c) of the 1934 Act." (Footnotes omitted.)

Id at 877.
Under the holding of *Gunter*, the limited equitable tolling rule of § 13 of the '33 Act would take precedence over the federal equitable tolling rule and the claims time barred. *See als* · Pet. 14-17.

scheme entirely by entirely disavowing any of the express claims provided or, alternatively, (2) to circumvent a statute of limitations dismissal concerning any express claims asserted by simultaneous assertion of implied claims based on the same conduct.

CONCLUSION

It is respectfully submitted that this Court grant AY's petition and consolidate it with *Herman & MacLean*. Alternatively, this Court is requested to defer any decision on AY's Petition until such time as it renders its decision in *Herman & MacLean* since, as noted in AY's earlier Petition at 16 n. 17, a ruling by this Court that no recourse to implied remedies may be had when an express remedy is provided, would be dispositive in this case as well.

DATED: June 2, 1982
New York, New York

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